88-1079

Supreme Court, U.S.
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NO.

In the

Supreme Court of the United States

October Term, 1988

ROGER KING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 1988

QUESTION PRESENTED

Should this Court restrict application of the mail and wire fraud statutes to only cover schemes in which actual money or property loss occurs?

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In the

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No.

ROGER KING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that writ of certiorari be issued to review a decision of the United States Court of Appeals for the Second Circuit, entered on October 24, 1988, which affirms Petitioner's conviction of mail fraud.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals is reported as *United States v. King*, 860 F.2d 54 (2d Cir. 1988), and is reprinted in the Appendix to this Petition, *infra*, at 1a-4a.[1]

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit, from which review is sought, was dated and entered on October 24, 1988 (1a to 4a). That decision affirmed a judgment of conviction that was entered March 30, 1988 against Petitioner in United States District Court for the Southern District of New York after a jury trial before the Honorable Gerard L. Goettel (17a-19a). This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 18, United States Code
§1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be

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1. Citations to the Appendix to this Petition are denoted by a lower-case "a" following the page number ("_____a"). Citations to the Appendix submitted to the Court of Appeals are denoted as "A _____".

delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve an important issue regarding the scope of the Mail Fraud Statute in the aftermath of *McNally v. United States*, _____ US _____, 107 S.Ct. 2875 (1987), and which has divided the various Courts of Appeals. Here, the Court of Appeals, going beyond the limits set by some other circuits, approved a conviction for Mail Fraud in spite of the fact that there was no proof of loss of money or property by either municipality involved.

Such a holding continues the "extraordinary expansion of the mail and wire fraud statutes" which was halted by this Court in *McNally*. *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 308 (1985) (Newman, J., dissenting). The continuing split amongst the various circuits regarding the outer limits of the mail fraud statute and the import of the *McNally* decision requires another decision by this Court.

Petitioner was convicted after a five day jury trial in the United States District Court for the Southern District of New York on two counts of mail fraud in violation of 18 USC §1341 and 2 (the original and superceding indictments are detailed in Appendix 20a to 24a). The Federal statutes involved and Federal Grand Jury Indictments formed the basis of jurisdiction in the District Court.

Petitioner made a motion for judgment of acquittal notwithstanding the verdict on the grounds that the government failed to prove that the municipalities involved (alleged victims) "were deprived of money or property" as a result of Petitioner's actions (5a to 13a). This motion was denied by the District Court (14a).

The facts of this case are essentially as follows:

In June 1985 Special Agent Vincent Wincelowicz of the Federal Bureau of Investigation was assigned as an undercover agent to

investigate Federal crimes in connection with the purchase and sale of equipment and supplies by municipal officials and the sellers of those supplies in New York State. To disguise his identity, Wincelowicz assumed the identity of Vincent Silon and in his undercover role as Vincent Silon posed as a sales representative for various companies doing business with municipalities and equipment suppliers in the State of New York. All references hereinafter will be to Silon.

As part of his undercover role, Silon began to work with and for J.J. King Company as a salesman for the equipment they had or could order. The exact nature of the relationship between Silon and J.J. King's is nebulous. However, eventually Silon came to a position where he felt that he could take "orders" for equipment to be sold through J.J. King Company. As Silon continued his contact with Petitioner he became, in effect, a salesman for J.J. King Company.

The government's case-in-chief depended almost completely upon meetings and conversations between Silon and Petitioner. Count One of the Indictment pertains exclusively to the sale of a used snowplow truck to the Town of Deer Park (22a to 23a) and Count Two of the Indictment pertains to the sale of a sand spreader to the City of Mount Vernon (23a to 24a).

COUNT I:

The following facts pertain to the sale of the truck to the Town of Deer Park. On November 12, 1986, Silon and Richard Conklin (Highway Superintendent of the Town of Deer Park) visited Petitioner at his place of business (A. 14-15), the John J. King of Monroe Company (hereinafter J.J. King Company), a company founded by Petitioner's grandfather and in which Petitioner was an officer. At the November 12, 1986 meeting, Conklin looked at several used trucks and had conversations with Silon concerning the possibilities of purchasing one of them for the Town of Deer Park. Silon testified that during that meeting he was told by someone whom he could not identify that the truck that Conklin was interested in could be sold, as is, for the "ballpark figure" of $6,500.00 (A. 16, 22).

Subsequently, on November 25, 1986, there were a series of phone conversations between Petitioner, Silon, and Conklin.

In the first phone call, Petitioner quoted to Silon a price of $6,500.00 for the truck in which Conklin had expressed an interest (A. 19, 38). Silon then called Conklin to give him the quoted price. Immediately however, Conklin informed Silon that he had already quoted a price of $8,500.00 to the Town Board, that he wanted a bigger plow on the front, and that he wanted the total price split amongst three bills (A. 20, 39). Silon then agreed with Conklin, without advising the Petitioner, that $2,000.00 was "for him" (meaning a kickback to Conklin).

Silon then called Petitioner and told him that Conklin wanted the truck but that he wanted a larger plow on the front and that he wanted the final price split into three bills totaling $8,500.00 plus $875.00 for the plow (A-21). Silon, on his own, had already broken the final price down into three bills and he proceeded to give Petitioner the price breakdown (A. 39-40). Silon did not tell Petitioner, in any manner, that the additional $2,000.00 was to provide a "kickback" to Mr. Conklin (A. 40, 43, 96-97).

From November 26, 1986 to December 2, 1986, Petitioner, with absolutely no knowledge of any kickback, invested his own considerable time, effort, and parts in preparing the truck for delivery to the Town of Deer Park (A. 84-95). Thereafter, on December 2, 1986 Silon went to J.J. King Company and met with Petitioner. At this time Petitioner indicated that the truck would be delivered to the Town of Deer Park the following day.

The truck was delivered by J.J. King Company to the Town of Deer Park on December 3, 1986 with a series of bills totaling $9,375.00.

The evidence at trial indicated that Silon gave $2,000.00 to Conklin as his "kickback" on the purchase of the truck (A. 24-25). This occurred at the Town of Deer Park on December 3, 1986 prior to Silon meeting with Petitioner and perhaps after the truck had been delivered to Deer Park. The $2,000.00 came from money supplied by the FBI, not Petitioner (A. 24).

Later in the day of December 3, 1986 Petitioner gave Silon $500.00 in cash as part of his commission for the sale of the truck to Deer Park (A. 25). J.J. King Company was ultimately paid for all four vouchers totaling $9,375.00. At a meeting on January 20, 1987 Petitioner gave Silon a check drawn on J.J. King Company in the amount of $2,875.00 (A. 32-34). Silon asked if this check

was his "commission" on the sale of the truck to Deer Park and Petitioner said yes (See Government Exhibit 10C, p. 16).

COUNT II

With respect to the sale of sand spreaders to the City of Mount Vernon as charged in the second count of the Indictment, the following facts are pertinent. On November 25, 1986, Silon advised the Petitioner in a phone conversation that the City of Mount Vernon was interested in purchasing large and small sand spreaders (A. 17-18).

Shortly thereafter, at a meeting on December 2, 1986, Petitioner gave Silon an approximate price of $3,000.00 for a small sand spreader (A. 23, 41-42) and an approximate price of $5,500.00 to $6,500.00 for a large sand spreader.

Again, unknown to the Petitioner, Silon on November 25, 1986 and at various times thereafter, met with officials from the City of Mount Vernon, and made certain bribes to these officials, part of which were to secure a sale for sand spreaders.

Silon obtained an order book from the J.J. King Company on December 22, 1986 (A. 26) and prepared two series of orders, one for a large sand spreader and one for a small sand spreader. The orders numbered 1001 through 1005, purported to breakdown the large sander into seperate parts and had a total price of $10,800.00 The orders numbered 1006 through 1008 purported to break down the small sander into various parts and had a total price of $6,000.00 (A. 27-29). The splitting of amounts and selection of terminology was done solely by Silon and Wallace Grosch (another equipment salesman).

J.J. King Company and Petitioner never took any action to obtain a large or small sand spreader for the City of Mount Vernon based on these slips or any statements of Silon (A. 35-36, 99-102, 110). However, in late January and early February, 1987, certain officials of the City of Mount Vernon contacted Petitioner directly concerning the purchase and delivery of sand spreaders (A. 103-104) and asked him what the market price of a small sand spreader would be. The subject of kickbacks was not discussed at all. Petitioner quoted a price of $3,820.00. This was agreed upon. As a result of this conversation, Petitioner obtained a small sand spreader (PS-8) from a company in New Hampshire

and caused it to be delivered to the City of Mount Vernon on February 10, 1987 (A. 107) and billed on February 13, 1987 in the amount of $3,820.00 (A. 108).

VALUE:

The only evidence presented at trial regarding the value of the truck and sand spreader was by Petitioner. Both Petitioner and John Hogan (expert on value of four-wheel drive trucks) testified that the truck sold to the Town of Deer Park was worth, as delivered, between $10,000.00 and $15,000.00 (A. 65). Petitioner also presented testimony regarding his substantial improvement in the truck between the time of its order and delivery (A. 84-95). The price paid by the Town of Deer Park was $9,375.00.

The sole evidence on the value of the sand spreader delivered to Mount Vernon was that it was worth about $3,900.00 (A. 104-105). The price paid by the City of Mount Vernon was $3,820.00.

There was no evidence presented at trial by Respondent that the municipalities would not have purchased the equipment for less absent the kickbacks or that they would have refused to purchase the equipment at the stated prices if they had known of the kickbacks.

Petitioner appealed his conviction on both Counts. The Court of Appeals affirmed the conviction stating that "the validity of a mail fraud conviction does not hinge upon a showing of actual loss by the intended victim" (3a) and that any reliance on *McNally* to support such a requirement is "misplaced" (3a).

ARGUMENT
I.

THE COURT SHOULD RESTRICT APPLICATION OF THE MAIL AND WIRE FRAUD STATUTES TO ONLY COVER SCHEMES IN WHICH ACTUAL MONEY OR PROPERTY LOSS OCCURS

The scope of mail fraud under 18 USC §1341 was severely limited by this Court in *McNally v. United States*, _____ U.S. _____, 107 S.Ct. 2875 (1987) by its rejection of the "intangible rights" theory. This Court held that mail fraud is limited in scope to the protection of money or property rights. The jury charge given by the District Court in *McNally* was held defective since the jury was not required to find that the Commonwealth, itself, was defrauded of any money or property. *Id.* at 2882.

In the instant case Petitioner specifically requested an instruction to the jury that there must be proof that the municipalities were actually defrauded out of money or property (A. 115-116). The District Court denied this request.

The Court of Appeals, in affirming Petitioner's conviction for mail fraud, held that no actual loss by the intended victim is required by *McNally*. (3a). The Court of Appeals cited *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *United States v. Andreadis*, 366 F. 2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967), and *Durland v. United States*, 161 U.S. 306, 315 (1896) in support of this position. It is significant to note that all of these cases predate *McNally*.

Petitioner submits that language within *McNally* and decisions of various Courts of Appeals requires actual loss of money or property by the "intended victim" as a required element of mail fraud.

This Court noted in *McNally* that in that case there was no evidence that the Commonwealth itself would have paid a lower premium absent the conduct of defendants in that case. In essence, the Commonwealth would have spent the same amount of money in any event. Thus, there was no loss of money despite the actions of Defendants. *Obtaining* "money or property" is a "necessary element of the crime" of mail fraud. *Carpenter v.*

United States, _____ U.S. _____, 108 S.Ct. 316, 320 (1987).

The Court of Appeals for the Seventh Circuit specifically recognized the possibility that *McNally* requires a "resulting loss of money or property" in *United States v. Gimble*, 830 F.2d 621, 627 n. 3 (7th Cir. 1987). The Court of Appeals in *Gimble* held that "the relevant fact in both cases [*McNally* and *Gimble*] is that the jury was not required to find that the scheme *resulted* in the government being deprived of money or property". *Id.* at 627 (emphasis added). Clearly the Seventh Circuit reads *McNally* to require actual deprivation.

Likewise, the Court of Appeals for the Tenth Circuit also requires an element of actual pecuniary loss for a conviction of mail fraud. *United States v. Shelton*, 848 F.2d 1485, 1496 (10th Cir. 1988). In *Shelton* the Court of Appeals noted that "the evidence of several witnesses established without dispute that the payment of kickbacks had no impact on the way in which the price of county purchases was set". *Id.* Thus, the record was void of any evidence that the payment of kickbacks caused pecuniary loss to the county. *Id.* at 1497.

Finally, and perhaps most significantly, the Court of Appeals for the Second Circuit has itself recognized that actual pecuniary loss "may be the correct view of [18 USC §1341]". *United States v. Evans*, 844 F.2d 36, 39 (2nd Cir. 1988). In *Evans* the Court of Appeals stated:

> Thus, as we read *McNally*, the Supreme Court did not focus on whether the person deceived also had to lose money or property.
>
> Nonetheless, this may be the correct view of the statute. If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party *must lose some money or property*. *Id.* (emphasis added)

Indeed, the Court of Appeals relied on language from *McNally* to support this conclusion.

This language seems irreconcilable with the Court of Appeals' decision in affirming Petitioner's conviction.

In the instant case, the J.J. King Company received $9,375.00 from the Town of Deer Park for the 1967 FWD sander truck (manufactured by FWD Corporation) with wing box, wing valves, wing plow, trip arms with rams and cables, and a "Good Roads" plow with caster wheels.

The only testimony at trial, uncontroverted even on cross-examination, concerning the value of the truck delivered was presented by Petitioner. John Hogan, an expert with years of experience as a sales representative for FWD Corporation (manufacturer of the truck), testified that he examined the truck sold to the Town of Deer Park and that in his opinion the truck was worth between $10,000.00 and $15,000.00 (A. 65).

In addition, Petitioner testified that his original quote to Silon of $6,500.00 was based on the truck as it stood in his lot without additions. Thereafter he realized from his conversations with Silon and Conklin that Conklin wanted significant improvements to the truck (e.g., the better plow) and that this was the reason for the increase in price (A. 80-84).

To this end, Petitioner spent several days (November 26 through December 2, 1986) personally improving the condition and equipment on the 1967 FWD sander truck (A. 84-95). Aside from the time he spent as a mechanic, it was established that the "new" truck was substantially improved by replacing certain parts, such as: the wing plow so that it had "tripping arms"; front plow; two hydraulic motors; chain in the conveyor flight; plow hitch; tires; orbital motors; rams for the wing box; windshield; and pump. In addition, Petitioner personally performed general servicing and undercoated the truck.

Respondent failed to present a scintilla of evidence to contradict Petitioner's testimony that the truck delivered to the Town of Deer Park was worth at least the $9,375.00 paid, if not substantially more. Quite simply, the Town of Deer Park got what it paid for. In fact, it got more, which Respondent acknowledged by failing to even attempt to establish that the Town of Deer Park was defrauded of any "money or property".

The evidence pertaining to Count Two of the Indictment relating to sanders and the City of Mount Vernon is even more clearly insufficient to support a finding of guilt as to Mail Fraud. The evidence indicated that the City of Mount Vernon ordered a

sand spreader (Air Flow PS-8) from Petitioner of J.J. King Company, in late January of 1987. Pursuant to this order Petitioner contacted another supplier and secured a sander, had it shipped from that supplier to J.J. King Company, inspected the sander himself, and then had it delivered to the City of Mount Vernon. The sander was delivered to the City of Mount Vernon on February 10, 1987 and on February 13, 1987 Petitioner billed the City of Mount Vernon for the sander in the amount of $3,820.00.

Regarding the value of the sander, the only evidence presented at trial revealed that the value of the sander delivered to the City of Mount Vernon was approximately $3,900.00. As such, the purchase price paid by the City of Mount Vernon was actually *less than* the normal sale value of the spreader. Therefore, the City of Mount Vernon was not defrauded of any money or property in the purchase of the sand spreader.

The lack of evidence of monetary loss by the City of Mount Vernon and the marginal quality of the government's case on this point was noted by the Trial Court at the conclusion of Respondent's case-in-chief when Petitioner moved for a Judgment of Acquittal (A. 47-62). At that time, the District Court noted that the evidence was such that "the (Petitioner) is in a position to say 'forgetting the paperwork, we sent $3,000-some-odd worth of equipment, and we got paid by Mount Vernon in that approximate amount". (A. 56). Even though the District Court Judge denied Petitioner's Motion for Judgment of Acquittal as to Count II, he stated that he would "be amazed if the jury can follow this second count" (A. 61). Later in the trial at the conclusion of evidence, the District Court noted that Petitioner was "misindicted" (A. 114). Such comments only further illustrate the paucity of evidence presented by Respondent as to a "loss" of money or property by the City of Mount Vernon.

Quite simply, Petitioner did not receive any money or property from the municipalities involved beyond that to which he was fairly entitled due to the equipment he delivered. While the evidence indicates that bribes were exchanged between *other* individuals pursuant to these equipment transactions, the evidence does not indicate that Petitioner was a party to them.

Petitioner's only "financial stake" in these two transactions was selling two pieces of road equipment at a reasonable fair market value. Thus, like the defendants in *McNally*, even though

Petitioner had a "financial stake" in selling the equipment. unless the municipalities suffered an actual loss of money or property. this "financial stake" does not constitute mail fraud under *McNally*.

CONCLUSION

For the foregoing reasons. Petitioner respectfully prays that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: December . 1988

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1418
(Argued August 18, 1988

August Term, 1987
Decided)
Oct 24 1988

Docket No. 88-1153

UNITED STATES OF AMERICA,

Appellee,

v.

ROGER KING,

Defendant-Appellant.

Before: WINTER and MINER, *Circuit Judges*, and BILLINGS, *District Judge*.*

Appeal from a conviction entered after a jury trial in the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*) for two counts of mail fraud. Appellant argues that the evidence was insufficient.
Affirmed.

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*The Honorable Franklin S. Billings, Jr., United States District Judge for the District of Vermont, sitting by designation.

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PER CURIAM:

Roger King, a Vice-President of J.J. King of Monroe, Inc., a distributor of highway maintenance equipment, appeals from his conviction under 18 U.S.C. §§1341 and 1342 (1982) of two counts of mail fraud. The evidence against King showed that he participated in a scheme in which the prices of various equipment offered for sale to two municipalities were inflated. Under the scheme, King broke the offering price down into several separate components so that corrupt municipal purchasing agents could evade competitive bidding requirements applicable to higher priced items. The total of these prices was then inflated in order to obtain money to pay kickbacks to those agents.

The defense presented evidence that, in the case of one municipality, the equipment in question was worth the total purchase price and, in the case of the other, the transaction was frustrated before completion. The defendant argues that the government failed to rebut this evidence and that there was therefore an absence of proof that the municipalities were defrauded of money or property. However, as we have said many times, the validity of a mail fraud conviction does not hinge upon a showing of actual loss by the intended victim. *See, e.g., United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *United States v. Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *see also Durland v. United States*, 161 U.S. 306, 315 (1896). It is enough that appellant knowingly devised a scheme to defraud and caused the use of the mails in furtherance of the scheme. In the case of the first municipality appellant misled it as to the true sale price by evading competitive bidding requirements and inflating the total to include a kickback. This was fraud whether or not the municipality got fair value because of some bizarre circumstances unexplained by King's expert. In the case of the second municipality, the frustration of the sale is irrelevant because ultimate success is not an element of the crime. *United States v. Eskow*, 422 F.2d 1060, 1064 (2d Cir.), *cert. denied*, 398 U.S. 959 (1970).

Appellant also relies on the decision in *McNally v. United States*, 107 S.Ct. 2875 (1987), to support his claim that loss of money or property must be shown. That reliance is misplaced. *McNally* held that mail fraud prohibits only schemes intended to

deprive victims of property such as money and not schemes depriving victims of intangible rights such as the right to honest government. *See also Carpenter v. United States*, 108 S.Ct. 316 (1987) (mail fraud statute extends to schemes defrauding property right to confidential information's exclusive use). The schemes here were unquestionably directed at money in municipal treasuries. The fact that kickbacks were also involved in *McNally* is of no aid to appellant because the legal theory of those convictions was based on the alleged deprivation of intangible rights, while King's conviction was specifically bottomed on the deprivation of what is undeniably property in a traditional sense.

We have examined appellant's other contentions and have found them to be without merit.

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

87 Cr 699 (GLG)

-v-

ROGER KING,

Defendant.

Defendant respectfully moves the Court to grant him judgment of acquittal notwithstanding the verdict for the following reasons:

1. The Government failed to prove that the municipalities of Deerpark and Mount Vernon were deprived of money or property as a result of the purchases of equipment from John J. King of Monroe, Inc.

2. The Government failed to prove that in the absence of the alleged scheme, the municipalities of Deerpark and Mount Vernon would have paid a lesser price for the equipment purchased from John J. King of Monroe, Inc.

3. The verdict is not supported by substantial evidence.

4. The Court erred in charging the jury and in refusing to charge the jury, as requested by the defendant.

Dated: January 5, 1988

Yours, etc.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

87 Cr 699 (GLG)

-v-

ROGER KING,

Defendant.

PRELIMINARY STATEMENT:

Defendant seeks a judgment of acquittal notwithstanding the verdict as to Count I and Count II of the Indictment charging him with violations of 18 U.S.C. 1341 and 18 U.S.C. 2 based on the Government's failure to prove any money or property loss to the municipalities in connection with the alleged scheme.

QUESTIONS PRESENTED:

1. Should the defendant's conviction stand in the absence of proof that the municipalities of Deerpark and Mount Vernon were defrauded of money or property?
2. Should the defendant's conviction stand in the absence of proof that the municipalities of Deerpark and Mount Vernon would have paid a lesser price for the equipment in the absence of the scheme alleged by the Government?

ARGUMENT:

POINT I. NEITHER OF THE MUNICIPALITIES OF DEERPARK OR MOUNT VERNON WERE DEPRIVED OF MONEY OR PROPERTY IN THEIR PURCHASE OF EQUIPMENT FROM JOHN J. KING OF MONROE, INC.

COUNT I. TOWN OF DEERPARK

The Town of Deerpark purchased a 1967 FWD sander truck, wing box, wing valves, wing plow, and trip arms with rams and cables, and a "Good Roads" plow with caster wheels. John J. King of Monroe, Inc. received $4,000.00 for the 1967 FWS sander truck; $3,500.00 for the wing box, wing valves, and wing plow; $1,000.00 for the trip arms with rams and cables; and $875.00 for the "Good Roads" plow with caster wheels.

In order to sustain the charge of mail fraud under 18 U.S.C. 1341, the Government must show that the municipality of Deerpark was deprived or money or property, through the defendant's use of or participation in a fraudulent scheme and his use of the United States mail in the furtherance of that scheme. *McNally v. United States*, _____ U.S. _____, 107 S.Ct. 2875 (1987). The Supreme Court concluded that the Mail Fraud statute clearly protects the property rights of persons and municipalities but does not extend to the protection of the citizenry's intangible right to good or honest government. _____ U.S. _____, 107 S.Ct. at 2879. The Court noted "that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property" *Id.*

In *McNally*, the Supreme Court reversed the District Court and the Court of Appeals rulings on the grounds that the jury charge given in the District Court permitted the defendant's conviction for conduct not within the scope of 18 U.S.C. 1341 since the jury was not required to find that the Commonwealth, itself, was defrauded of any money or property. *Id.* at 2880.

John J. King of Monroe, Inc. received $9,375.00 from the Town of Deerpark for the 1967 FWD sander truck with wing box, wing valves, wing plow, trip arms with rams and cables, and a "Good Roads" plow with caster wheels. The only testimony at

trial concerning the value of the used equipment indicated that its fair value was between $10,000 and $15,000.

The Government has failed to prove that the Town of Deerpark was deprived of any money or property as a result of its purchase of the truck and equipment from John J. King of Monroe, Inc. The Government has failed to prove or dispute the value of the truck and equipment. Further, the Government failed to offer any proof at trial that a similar truck with similar equipment was available to the Town of Deerpark for a lesser price. Since the Government failed to prove that the Town of Deerpark was deprived of any money or property under the *McNally* standard, a judgment of acquittal notwithstanding the verdict should be entered.

COUNT II: CITY OF MOUNT VERNON

The City of Mount Vernon purchased (from John J. King of Monroe, Inc.) one "Air Flow PS-8" material spreader with an extended chute and screens for $3,820.00 This transaction occurred pursuant to a Purchase Order submitted by the City of Mount Vernon to John J. King of Monroe, Inc.

The Government alleged in its indictment that the defendant inflated billings of John J. King of Monroe, Inc. to the City of Mount Vernon so that kickbacks could be paid to public officials. Yet the Government failed to prove that $3,820.00 was in fact, an inflated price for the material spreader with an extended chute and screens. Furthermore the Government failed to show that any kickbacks or other monies were paid by the defendant to public officials in the City of Mount Vernon, or the undercover agent to cover any kickback payments he might have made.

In order to sustain this charge of mail fraud under 18 U.S.C.1341, the Government must show that the municipality of Mount Vernon was deprived of money or property through the defendant's use of or participation in a fraudulent scheme and his use of the United States mail in the furtherance of that scheme. *McNally v. United States*, _____ U.S. _____, 107 S. Ct. 2875 (1987). The Supreme Court concluded that the Mail Fraud statute clearly protects the property rights of persons and municipalities but does not extend to the protection of the citizenry's intangible right to good or honest government. *Id.* at 2879. The Court

noted "that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property". *Id.*

However, at the trial of this action, the Government failed to prove that the City of Mount Vernon was deprived of any money or property in connection with its purchase of the material spreader with extended chute and screens from John J. King of Monroe, Inc. The Government failed to prove that the billing of this particular item was inflated or that the City of Mount Vernon paid more money than the material spreader was worth. The prosecution failed to show the retail cost of a new "Air-Flow PS-8" material spreader, and also failed to prove the cost of any substitute material spreader which the City could have purchased. The proof at trial showed that this material spreader cost $2,741.00 to John J. King of Monroe, Inc. and that John J. King of Monroe, Inc. paid more that $800.00 in shipping costs. Further, the defense attorney offered testimony that the retail price of a new "Air-Flow PS-8" material spreader sold just before this transaction exceeded $3900.00

Since the Government failed to prove that the City of Mount Vernon was deprived of any money or property under the *McNally* standard, a judgment of acquittal notwithstanding the verdict as to Count II of the indictment against the defendant, Roger King, should be entered.

POINT II. THE MUNICIPALITIES OF DEERPARK AND MOUNT VERNON WOULD NOT HAVE PAID A LESSER PRICE FOR THE EQUIPMENT ORDERED FROM AND DELIVERED BY JOHN J. KING, OF MONROE, INC. IN THE ABSENCE OF THE SCHEME TO DEFRAUD ALLEGED BY THE GOVERNMENT.

A. COUNT I. TOWN OF DEERPARK

Not only was the Town of Deerpark not deprived of money or property in connection with its purchase of used equipment from John J. King of Monroe, Inc., but the expenditure itself did not constitute a deprivation of money or property under Title 18, Section 1341 of the United States Code. The Town of Deerpark, through its officials sought to purchase a used four wheel drive

truck with a front plow and an operating wing plow. Whether or not this purchase was made from the defendant, the Town of Deerpark was nevertheless going to expend funds in order to make the purchase.

This Court, in *Ingber v. Enzor*, 664 F.Supp. 814 (S.D.N.Y. 1987) held that the ordinary and necessary expenditures made by a municipality do not constitute a loss of money or property. *Id.* at 821. Such ordinary and necessary expenditures do not rise to the level of "loss" as was contemplated by the Supreme Court in its decision in *McNally*. *Id.* Ingber was originally convicted of mail fraud in connection with his use of the mails to submit fraudulent absentee ballots in the town elections in Fallsburg, New York. The District Court's rationale in the *Ingber* case was that the municipality of Fallsburg was going to pay a Supervisor's salary to some duly elected office holder, regardless of who that Supervisor was. Even though Ingber won his seat through the use of fraudulent absentee ballots, there was no loss to the municipality of money or property to sustain a conviction for mail fraud under the *McNally* analysis. *Id.* at 822.

The Government did not allege, much less prove, that the Town of Deerpark, in the absence of the alleged scheme, would have paid a lesser amount for the truck and equipment ordered from the defendant and delivered by John J. King of Monroe, Inc. The Government failed to prove that the Town of Deerpark was defrauded in its expenditure of funds in connection with its purchase from John J. King of Monroe, Inc. The Government failed to offer testimony as to the value of the truck and equipment: or even if the Town of Deerpark could have acquired a similar used truck and equipment from another vendor in used equipment, for a lower price.

Since an expenditure was going to be made by the Town of Deerpark for a used sander truck with plows, the Government must show that in the absence of the alleged scheme to defraud, the Town of Deerpark would have paid a lesser price for the truck and equipment. Since the Government has failed in its burden, a judgment of acquittal notwithstanding the verdict as to Count I of the Indictment against the defendant, Roger King, should be entered.

COUNT II. CITY OF MOUNT VERNON

Not only was the City of Mount Vernon not defrauded in connection with its purchase of a material spreader from the defendant, but the expenditure itself did not constitute a deprivation of money or property under Title 18, Section 1341 of the United States Code. The Department of Public Works for the City of Mount Vernon sought to purchase a material spreader. Whether the City expended funds to purchase a material spreader from John J. King of Monroe, Inc. or another supplier, the City was still going to expend funds in order to make the purchase.

This court, in *Ingber v. Enzor*, 664 F. Supp. 814 (S.D.N.Y. 1987), held that the ordinary and necessary expenditures made by a municipality, do not constitute a "loss" of money or property. *Id.* at 821. Such ordinary and necessary expenditures do not rise to the level of "loss" as was contemplated by the Supreme Court in its decision in *McNally*. *Id.* Ingber was originally convicted of mail fraud in connection with his use of the mails to submit fraudulent absentee ballots in the town elections in Fallsburg, New York. The District Court's rationale in the *Ingber* case was that the municipality of Fallsburg was going to pay a Supervisor's salary to some duly elected office holder regardless of who that Supervisor was. Even though Ingber won his seat through the use of fraudulent absentee ballots, there was no loss to the municipality of money or property to sustain a conviction for mail fraud under the *McNally* analysis. *Id.* at 822.

The Government did not allege, much less prove that the City of Mount Vernon would have paid a lesser price for the material spreader in the absence of the alleged scheme to defraud. The Government failed to prove that the City of Mount Vernon was defrauded of money or property in connection with its purchase of a material spreader from John J. King of Monroe, Inc. The Government failed to offer testimony as to the value of a material spreader, or its retail cost. The Government also failed to prove that the same or a comparable material spreader could have been purchased from another supplier at a lesser price.

The proof at trial showed that this material spreader cost $2,471.00 to John J. King of Monroe, Inc. and that John J. King of Monroe, Inc. paid more that $800.00 in shipping costs. Further,

the defense attorney offered testimony that the retail price of a new "Air-Flow PS-8" material spreader sold just before this transaction exceeded $3900.00.

Since an expenditure was going to be made by the City of Mount Vernon for a material spreader, the Government must show that in the absence of the alleged scheme, the municipality would have paid a lesser price for the eqiupment. Since the Government has failed in its burden, a judgment of acquittal notwithstanding the verdict as to Count II of the Indictment against the defendant, Roger King, should be entered.

CONCLUSION

For all the foregoing reasons, a judgment of acquittal notwithstanding the verdict should be entered as to Counts I and II of the Indictment against the defendant, Roger King, based on the Supreme Court's decision in *McNally* and the Southern District's decision in the *Ingber* case.

Dated: January 5, 1988

Respectfully submitted,

/S/_____
DUGGAN, CROTTY & DUNN, P.C.
By: Bruce C. Dunn, Sr.
Attorney for Defendant
Roger A. King

To: Rudolph W. Giuliani
United States Attorney

Michele Hirshman
Assistant United States Attorney
One Saint Andrew's Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Received Jan 21, 1988

UNITED STATES OF AMERICA,

87 Cr. 699 (GLG)

-against-

ORDER

ROGER KING,

Defendant.

The defendant moves for judgment of acquittal notwithstanding the verdict. The issues raised were put forth at trial and denied by the court for reasons stated on the record. There is no requirement in a mail fraud indictment that the Government prove that the victims were deprived of money or property, or that they would have gotten a better bargain had there been no fraud involved. The jury's verdict was supported by substantial evidence. The jury charge was proper. The motion for judgment of acquittal is therefore denied.

SO ORDERED.

Dated: White Plains, N.Y.
January 19, 1988

/S/_____
GERARD L. GOETTEL
U.S.D.J.

SDNY
87 Cr 699
GOETTEL (0864)

UNITED STATES COURT OF APPEAL
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of October one thousand nine hundred and eighty-eight.

Present: Hon. Ralph K. Winter,
Hon. Roger J. Miner, Circuit Judges,
Hon. Franklin S. Billings, District Judge.*

Filed Oct 24, 1988

UNITED STATES OF AMERICA,

Appellee,

-v.-

Docket No. 88-1153

ROGER KING,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District

*Hon. Franklin S. Billings, Jr., United States District Judge for the District of Vermont, sitting by designation.

of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this court.

ISSUED AS MANDATE: NOV. 16, 1988

Elaine B. Goldsmith,
Clerk,

By: Edward J. Guardaro, Clerk

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

United States of America vs.
ROGER A. KING
Old Country Road, Monroe, New York 10950

Docket No. S87 Cr. 00699-01 (GLG)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government AUSA MICHELE HIRSHMAN
the defendant appeared in person on this date 03/30/88

Date of offense: 1986-87

☐ WITHOUT COUNSEL
However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL BRUCE DUNN, ESQ.
(Name of Counsel)

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea.

☐ NOLO CONTENDERE. ☐ NOT GUILTY

There being a finding/verdict of
☐ NOT GUILTY, Defendant is discharged
☒ GUILTY, to cts. S1 and S2.

Defendant has been convicted as charged of the offense(s) of Mail Fraud (Title 18 U.S.C. §1341F.)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) MONTHS on ct. 1. Sentence may be served on weekends. On ct. 2, the execution of sentence is suspended, and the defendant is placed on probation for a period of ONE (1) YEAR, subject to the standing probation order of this court. Probation to commence upon expiration of confinement.

In addition, a $50 assessment is imposed by the Court upon the defendant on each count (total $100) as provided by law pursuant to Title 18, U.S. Code, Section 3013(a)(2).

The underlying indictment is dismissed.

THE EXECUTION OF SENTENCE IS STAYED PENDING APPEAL.
As a condition of probation, the defendant shall not run for public office or occupy a position of public trust.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, or extend period of the probation,
and at any time during the probation period or within a maximum probation period of the years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends community treatment facility.

Ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

☒ U.S. District Judge
Filed March 30, 1988

GERARD L. GOETTEL

Date 3/30/88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed Sep 10 1987

UNITED STATES OF AMERICA,

v.

INDICTMENT
87 CRIM. 0699

ROGER KING,

Defendant.

COUNT ONE

The Grand Jury charges:

1. At all times relevant to this Indictment, ROGER KING, the defendant, was associated with John J. King of Monroe, Inc. (hereinafter, "J.J. King"), a supplier of equipment.

2. Between in or about November, 1986 and in or about January, 1987, in the Southern District of New York, ROGER KING, the defendant, did devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses. It was an object of the scheme to deprive the municipality of Deer Park, New York ("Deer Park") of approximately $2,000.

3. It was part of said scheme that the defendant, ROGER KING, made a kickback payment of $2000 to the highway superintendent of Deer Park, New York in connection with the purchase of various equipment by Deer Park.

4. It was a further part of the scheme that ROGER KING, the defendant, caused billings for the equipment to be inflated in an amount totalling approximately $2,000 and, further, after J.J. King had received payment from Deer Park for the equipment, ROGER KING, the defendant, would and did authorize a disbursement from J.J. King for the $2,000 kickback payment.

5. In the Southern District of New York, ROGER KING, the defendant, unlawfully, willfully and knowingly, and for the purpose of executing the fraudulent scheme set forth in Paragraphs 1 through 4 of this Indictment did cause to be delivered by mail, according to the direction thereon, matter and things, to wit, invoices from J.J. King, Monroe, New York, to the municipality of Deer Park, New York, on or about December 3, 1986 and did receive through the United States mails a payment check from the municipality of Deer Park, New York to J.J. King, Monroe, New York, on or about January 17, 1987.

(Title 18, United States Code, Section 1341 and 2).

COUNT 2

The Grand Jury further charges:

6. Between in or about November, 1986 and February, 1987 in the Southern District of New York, ROGER KING, the defendant, did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations. It was an object of the scheme to deprive the City of Mount Vernon, New York of sums of money.

7. It was a part of the scheme that, in connection with the purchase of certain equipment from J.J. King by the City of Mount Vernon, New York, ROGER KING, the defendant, did inflate billings from J.J. King to the City of Mount Vernon, New York.

8. On or about February 13, 1987, in the Southern District of New York, the defendant, ROGER KING, unlawfully, willfully and knowingly and for the purpose executing the fraudulent scheme set forth in Paragraphs 6 and 7 of this Indictment did cause to be delivered by mail, according to the direction thereon, a claim form and an invoice, from J.J. King, Monroe, New York to the City of Mount Vernon, New York.

(Title 18, United States Code, Section 1341).

_____

FOREPERSON

_____

RUDOLPH W. GIULIANI
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

– v.

INDICTMENT
S87 Cr. 699 (GLG)

ROGER KING,

Defendant.

COUNT ONE

The Grand Jury charges:

1. At all times relevant to this Indictment, John J. King of Monroe, Inc. (hereinafter, "J.J. King"), located in Monroe, New York, was a vendor of construction and other equipment to various entities, including municipalities in the State of New York.

2. At all times relevant to this Indictment, ROGER KING, the defendant, was associated with J.J. King and did act for and on behalf of J.J. King in connection with sales of equipment by J.J. King to municipalities in the State of New York.

3. Between in or about November, 1986 and in or about January, 1987, in the Southern District of New York, ROGER KING, the defendant, and others known and unknown to the Grand Jury, unlawfully, willfully and knowingly did devise and intend to devise a scheme and artifice to defraud the Town of Deerpark, New York (hereinafter "Deerpark") and to obtain money by means of false and fraudulent pretenses.

4. It was an object of the scheme that a kickback payment of $2,000 would be and was made to the highway superintendent of Deerpark in connection with the purchase of equipment by Deerpark from J.J. King.

5. It was a part of the scheme that ROGER KING the defendant,

did agree to inflate and did cause to be inflated the billing for the equipment purchased by Deerpark in an amount totalling approximately $2,000.

6. It was a further part of said scheme that, on or about January 20, 1987, after J.J. King had received payment from Deerpark for the equipment, ROGER KING, the defendant, did cause a check to be issued by J.J. King to an undercover agent acting as a salesman to cover the $2,000 kickback payment to the Deerpark highway superintendent.

7. In the Southern District of New York, ROGER KING, the defendant, unlawfully, willfully and knowingly, and for the purpose of executing the fraudulent scheme set forth in Paragraphs 1 through 6 of this Indictment, and attempting to do so, did cause to be delivered by mail, according to the direction thereon, matter and things, to wit, vouchers and invoices from J.J. King, Monroe, New York, to Deerpark, New York, on or about December 3, 1986 and a payment from Deerpark, New York to J.J. King, Monroe, New York, on or about December 17, 1986.

(Title 18, United States Code, Sections 1341 and 2).

COUNT 2

The Grand Jury further charges:

8. Paragraphs One and Two of Count One of this Indictment are realleged as if fully set forth herein.

9. Between in or about November, 1986 and in or about February, 1987, in the Southern District of New York, ROGER KING, the defendant, and others known and unknown to the Grand Jury, unlawfully willfully and knowingly did devise and intend to devise a scheme and artifice to defraud the City of Mount Vernon, New York (hereinafter "Mount Vernon") and to obtain money by means of false and fraudulent pretenses and representations.

10. It was an object of the scheme that kickback payments would be and were made to employees and officials of Mount Vernon in connection with a purchase of material spreaders by Mount Vernon from J.J. King and that the price to be charged by J.J. King would be in an amount to cover the kickback payments.

11. It was a part of the scheme that, in connection with the

purchase of material spreaders from J.J. King by Mount Vernon. ROGER KING, the defendant, would and did agree to inflate the amount to be charged by J.J. King to Mount Vernon for the material spreaders.

12. In the Southern District of New York, the defendant, ROGER KING, unlawfully, willfully and knowingly and for the purpose executing the fraudulent scheme set forth in Paragraphs 8 through 11 of this Indictment, and attempting to do so, did cause to be delivered by mail, according to the direction thereon, a claim form and an invoice, from J.J. King, Monroe, New York to Mount Vernon, New York, on or about February 13, 1987, and a payment check from Mount Vernon, New York to J.J. King, Monroe, New York, on or about February 26, 1987.

(Title 18, United States Code, Sections 1341 and 2).

_____

FOREPERSON

_____

RUDOLPH W. GIULIANI
UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1079

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROGER KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
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(202) 633-2217

13 pp

QUESTION PRESENTED

Whether, under *McNally* v. *United States,* No. 86-234 (June 24, 1987), petitioner was properly convicted of mail fraud for participating in a scheme to inflate the price of equipment offered for sale to two municipalities.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1079

ROGER KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 860 F.2d 54.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1988. The petition for a writ of certiorari was filed on December 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three months' imprisonment, to be followed by one year of probation. The court of appeals affirmed.

1. As the court of appeals summarized: "The evidence against [petitioner] showed that he participated in a scheme in which the prices of various equipment offered for sale to two municipalities were inflated. Under the scheme, [petitioner] broke the offering price down into several separate components so that corrupt municipal purchasing agents could evade competitive bidding requirements applicable to higher priced items. The total of these prices was then inflated in order to obtain money to pay kickbacks to those agents." Pet. App. 3a.

The evidence at trial is described in more detail in the government's brief in the court of appeals (Gov't C.A. Br. 2-15). It showed that petitioner, the vice-president of John J. King of Monroe, Inc. ("J.J. King"), a distributor of highway maintenance equipment, engaged a person he knew as Vince Silon to sell used equipment on a commission basis in the fall of 1986. Silon was actually Vincent Wincelowicz, an undercover FBI agent investigating corruption in the sale of equipment and supplies to New York municipalities.

In November 1986, Wincelowicz brought Richard Conklin, the highway superintendent for the Town of Deerpark, New York, to J.J. King to inspect a second-hand truck to be used for snow removal. During the visit, Wincelowicz asked petitioner if J.J. King could accommodate Conklin by breaking up the total amount to be charged Deerpark into several small bills in order to avoid competitive bidding. Petitioner agreed to do so. In a subsequent tape-recorded telephone conversation, petitioner quoted a price of $6,500 to Wincelowicz, broken down into three parts. He also promised Wincelowicz a $500 commission on the sale. Gov't C.A. Br. 3-4.

Wincelowicz later told petitioner in another tape-recorded telephone conversation that Conklin wanted the price increased by $2,000, which Conklin would pocket,

and that Conklin also wanted to add a plow to the truck. Petitioner responded that a plow would cost $800. Petitioner further suggested that Wincelowicz should "take care of" Conklin. Pursuant to the discussion, petitioner increased the price by $2,875 to cover Conklin's kickback and the plow, and broke the bill into four parts. After the truck was delivered to Deerpark and the Town paid its four bills totalling $9,375, petitioner gave Wincelowicz a check for $2,875, which represented Conklin's kickback and an additional commission for Wincelowicz. Gov't C.A. Br. 4-7.

The other scheme involved the City of Mount Vernon, New York. After learning that the City would be buying a "spreader" (a device used to spray sand or salt on icy roads), Wincelowicz gave an advance kickback of $500 to Ronald Iaboni, the City's Commissioner of Public Works. Petitioner advised Wincelowicz that a large spreader would cost about $6,000. In tape-recorded conversations in November and December of 1986, Wincelowicz said that it again would be necessary to break the bill into smaller parts and that $2,000 would have to be added for Iaboni. Petitioner ultimately agreed to charge $10,200, to be billed in five parts. Wincelowicz similarly arranged for the City of Mount Vernon to buy a small spreader, which petitioner said should cost about $3,000, for $6,000. That sum included a $1,000 kickback. The small spreader was delivered in February of 1987 and the City promptly paid a bill for $3,820 that petitioner had submitted. No further payments had been made, and the large spreader had not been delivered, when Wincelowicz's undercover assignment ended abruptly, in March 1987, after he was identified as an FBI agent. Gov't C.A. Br. 7-15.

2. The court of appeals affirmed petitioner's conviction (Pet. App. 1a-4a). The court first rejected petitioner's

claim that the mail fraud convictions could not stand because the government had failed to prove that either the Town of Deerpark or the City of Mount Vernon actually lost money. Petitioner's claim was based on testimony that the truck Deerpark bought was worth the sales price[1] and the fact that the Mount Vernon transaction had not been completed. The court observed: "[A]s we have said many times, the validity of a mail fraud conviction does not hinge upon a showing of actual loss by the intended victim. It is enough that [petitioner] knowingly devised a scheme to defraud and caused the use of the mails in furtherance of the scheme. * * * [U]ltimate success is not an element of the crime." Pet. App. 3a (citations omitted).

The court of appeals also concluded that this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), did not require reversal of petitioner's convictions since "[t]he schemes here were unquestionably directed at money in municipal treasuries" (Pet. App. 4a). The court explained that "[t]he fact that kickbacks were also involved in *McNally* is of no aid to [petitioner] because the legal theory of those convictions was based on the alleged deprivation of intangible rights, while [petitioner's] conviction was specifically bottomed on the deprivation of what is undeniably property in a traditional sense" (*ibid.*).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8-9), proof of an actual loss of money or property by the intended victim is not an essential element of mail fraud. The mail fraud statute, 18 U.S.C. 1341, prohibits persons who,

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[1] Although petitioner's witness examined the truck the day before he testified and stated that it was worth at least $10,000, he was not aware that the truck's engine had exploded within a month of its delivery and had been replaced. Gov't C.A. Br. 18.

"having devised or intending to devise any scheme or artifice to defraud," from using the mails "for the purpose of executing such scheme or artifice or attempting to do so." The statute therefore expressly reaches not only those persons who successfully carry out schemes to defraud, but also those who intend to devise such schemes and attempt to execute them. Accordingly, the statute does not require the government to prove that the victim of the scheme to defraud was actually defrauded; the government is only required to prove that a defendant "*contemplated* some actual harm or injury" to the victim of the scheme. *United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (emphasis in original); see also *United States* v. *Eskow*, 422 F.2d 1060, 1064 (2d Cir.), cert. denied, 398 U.S. 959 (1970); *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966).

This Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), did not alter that long-standing principle. The defendants there were convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), the Court reversed. Noting that "the Government now relies in part on the assertion that the petitioner obtained property by means of false representations," the Court concluded that the convictions could not be upheld on that basis because "there was *nothing* in the jury charge that required such a finding" (slip op. 10-11) (emphasis added). All that the jury in *McNally* had to find to convict, as the Court subsequently noted in *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), was that Kentucky had been deprived of the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute" (slip op. 6).

Nor does this Court's decision in *Carpenter* support petitioner's contention. In that case, the Court made clear that the property protected by the mail fraud statute includes intangible property, stating that "*McNally* did not limit the scope of §1341 to tangible as distinguished from intangible property rights" (slip op. 6). Indeed, the Court reiterated that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises" (*id.* at 7), and held that a conspiracy to trade on an employer's confidential business information is within the reach of the statute.

McNally and *Carpenter* therefore established that the mail fraud statute did not reach schemes to defraud citizens of their intangible rights to honest and impartial government, but was limited in scope to the protection of property rights. Nothing in *McNally* or *Carpenter*, however, required the government to prove that the victim of the scheme suffered an actual loss of money or property. Instead, *McNally* and *Carpenter* simply required the government to show that the *object* of the scheme was to deprive the victim of money or property.

The decision of the court of appeals in this case is thus fully consistent with *McNally* and *Carpenter*. This case involved a straightforward kickback scheme through which petitioner agreed to pay unearned commissions to the municipal purchasing agents in order to sell his equipment to the municipalities. The other courts of appeals that have addressed the issue since *McNally* have overwhelmingly agreed that normal kickback schemes involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Rico Industries, Inc.*, 854 F.2d 710 (5th Cir. 1988), cert. denied, No. 88-1111 (Mar. 20, 1989); *United States* v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, No. 88-532 (Jan. 17, 1989); *United*

States v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), cert. denied, No. 87-1946 (Oct. 3, 1988); *United States* v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

2. There is likewise no merit in petitioner's contention that the decision of the court of appeals here conflicts with the decisions in *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987), and *United States* v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988).

In *Gimbel*, the Seventh Circuit held that a scheme to avoid filing currency transaction reports was a scheme to defraud the Treasury Department of "intangible rights" in data rather than a scheme to deprive the government of money or property. Rejecting the government's argument that it may have been deprived of tax revenues because the information, if disclosed, might have led to an assessment of tax deficiencies, the court concluded that the possibility of such an assessment did not convert the scheme into one to defraud the United States of money (830 F.2d at 626-627). In this case, by contrast, the intended effect on the municipalities' treasuries was direct rather than speculative. Moreover, and contrary to petitioner's contention (Pet. 9), the Seventh Circuit did not read *McNally* to require proof of an actual loss of money or property by the victim as an element of mail fraud. Indeed, the court expressly declined to "express any view as to whether a scheme that has not reached fruition, and in which there is no resulting loss of money or property, may ever form the basis of a mail fraud prosecution" (830 F.2d at 627 n.3).

In *Shelton*, the Tenth Circuit reversed the mail fraud convictions of two county commissioners who took kickbacks from suppliers selling goods to the county.

Contrary to petitioner's contention, though, the court in *Shelton* did not hold that proof of an actual loss by the victim was an element of mail fraud. Instead, the court merely concluded that the money or property that is the object of the scheme to defraud must be that of the victim. The court pointed out that, under the unusual facts of that case, "the evidence at trial tended to show that the sales were made at a previously established low price and that the kickbacks were paid out of the suppliers' profits" rather than out of inflated prices paid by the county (848 F.2d at 1491). Here, by contrast, as in most kickback cases, the court of appeals correctly concluded (Pet. App. 3a-4a) that the evidence established that the kickbacks would ultimately be paid by the Town of Deerpark and the City of Mount Vernon.[2]

3. Finally, Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the

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[2] Petitioner also mistakenly claims that the decision of the court of appeals here conflicts with *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988). To be sure, the court in *Evans* stated in dictum that "[i]f a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property" (*id.* at 39). Taken in the context of its entire discussion, however, the court was simply considering whether the money or property that the defendants sought to obtain as a result of the scheme to defraud must belong to the alleged victim, and not whether the victim must suffer an actual loss of money or property. In any event, petitioner's claim of an intracircuit conflict raises an issue for the court of appeals, and not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). As the court of appeals stated (Pet. App. 3a), the rule that the victim of a scheme to defraud need not actually lose money or property was well established prior to *McNally*. Even if the opinion in *McNally* had questioned that rule, that case will no longer govern mail fraud prosecutions in the future, as Congress has made plain. Moreover, persons who participate in schemes to bribe municipal employees may now be prosecuted for depriving the citizens of their intangible right to honest government, whether or not the municipalities lost money or other property. Thus, there is no prospective importance to petitioner's contention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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